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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 10

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE under an agreement with Gertrude Feldman James, deceased

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12–15) is reported in 29 B. T. A. 1141. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 22–29) is reported in 74 F. (2d) 242.

JURISDICTION

The judgment of the Circuit Court of Appeals affirming the Board of Tax Appeals was entered

December 24, 1934. (R. 29.) Petition for writ of certiorari was filed March 23, 1935, and was granted April 29, 1935. (R. 30.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 302 (d) of the Revenue Act of 1926 requires the inclusion in the gross estate of the value of the corpus of a trust created by the decedent in 1930, where the grantor in conjunction with her husband, who had a contingent interest therein, and the trustee, had the power to revoke or modify the trust.

2. If so construed, whether Section 302 (d) violates the Fifth Amendment to the Constitution.

3. Whether Section 302 (d) of the Revenue Act of 1926 requires the inclusion in the gross estate of the value of certain contingent remainder interests in a trust created by the decedent in 1930, where the grantor, in conjunction with her husband and the trustee, had the power to revoke or modify the trust.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, 70:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *.

STATEMENT

The essential facts as stipulated and found by the Board are as follows:

The decedent, Gertrude Feldman James, died May 20, 1931, a nonresident of the United States. (R. 13.)

On February 21, 1930, she transferred certain securities to the City Bank Farmers Trust Company in trust for certain purposes during the lives of her two daughters, or the survivor of them. (R. 13.)

The income of the trust was to be paid to her until her death or until the termination of the trust, whichever should first occur. (R. 13.)

In the event that she died prior to the termination of the trust, the income was to be paid to the grantor's husband, Samuel James, so long as he lived or until the termination of the trust. If he died prior to the termination of the trust, the principal was to be divided into as many shares as there were children of the grantor and Samuel James then living, plus one share for the descendants then living of a deceased child. The income

of each share was to be applied to the use of such child during his life or until the termination of the trust period, whichever should first occur, and, upon his death prior to the termination of the trust, the principal was to be paid to his descendants in such proportions as he had appointed by will, and any part not so appointed was to be paid to his descendants, if living, in equal parts *per stirpes*. If no descendants of such child were living at that time, the principal was to be paid in equal parts *per stirpes* to the surviving children of the settlor and Samuel James and the descendants of a deceased child, or if none were living, to such persons as should then constitute the heirs at law of Samuel James according to the laws of New York then governing the descent of real estate. (R. 13.) In the case of the child who had predeceased the settlor, the principal of the share set apart for her descendants was to be paid over to such descendants in equal parts *per stirpes*. (R. 13.)

Upon the termination of the trust period, the principal was to be paid to Samuel James, if then living; and, if not, to the settlor, if then living; or, if not, to such beneficiaries as were then receiving the income as above outlined and in the same proportions; or, if no such beneficiaries were then living, to the heirs of Samuel James according to the laws of New York governing the descent of real estate. (R. 13–14.)

The trustee was given authority from time to time to apply to the use of the grantor's husband

and descendants so much of the principal as it deemed advisable for their proper "education, care, comfort, support, or advancement in life." (R. 5, 14.)

Paragraph 12 of the trust agreement provided as follows (R. 14):

> The Settlor shall have the right, at any time, and from time to time during her life, by an instrument or instruments in writing delivered to the Trustee to modify, alter, or revoke this agreement in whole or in part, or to change any beneficial interest hereunder, provided, however, that no such revocation, alteration, or change of beneficial interest shall be effected without the consent in writing of the Trustee and of the said Samuel James during his life and, after his death, of the Trustee and of Frank Samuel James, brother of the said Samuel James, during his life and in case of disagreement between the Settlor and the City Bank Farmers Trust Company, then the decision of the said Samuel James or Frank Samuel James, as the case may be, shall be final and the Settlor reserves to herself the right to increase this trust by delivering property or making insurance policies payable to the Trustee for that purpose but the duties and liabilities of the Trustee shall not be substantially increased without its written consent.

Samuel James, the husband of the settlor, survived his wife, whose death occurred prior to the termination of the trust, and the provisions of the trust instrument became effective as therein provided upon the happening of that contingency. (R. 11.)

The Commissioner determined a deficiency in estate tax of $11,840.03, based upon his inclusion of the value of the corpus of the trust estate in the decedent's gross estate, under Section 302 (d) of the Revenue Act of 1926. (R. 9, 14.)

The Board reversed the action of the Commissioner, holding that Section 302 (d) did not apply. (R. 15.) The Circuit Court of Appeals, one Judge dissenting in part, affirmed the decision of the Board. (R. 29.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing and refusing to find that the enjoyment of said securities was subject to change at the date of the decedent's death, through the exercise of the power, "either by the decedent alone or in conjunction with any person, to alter, amend, or revoke", within the meaning of Section 302 (d) of the Revenue Act of 1926.

2. In failing and refusing to find that the value of certain contingent remainder interests in the trust created by the decedent in 1930 should be included in the gross estate of the decedent, where the grantor, in conjunction with her husband and

the trustee, had the power to revoke or modify the trust.

3. In affirming the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

Section 302 (d) of the Revenue Act of 1926, *supra,* requires that there shall be included in the decedent's gross estate the value of any property of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of decedent's death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke the trust.

The statute is clear and unambiguous, and contains no qualification as to the "person" who shares the power of revocation or amendment with the decedent. A beneficiary constitutes "any person" within the requirement of Section 302 (d), *supra,* and there is nothing in the statute itself, or in its legislative history, to warrant a construction that the words "any person" are to be restricted so as to mean "any person not a beneficiary."

The statute when so construed is not unconstitutional. This Court has sustained the validity of Section 302 (d) as applied to a case where the grantor alone could modify the trust, but could not revest title in himself. The justification of the tax, therefore, lies in the grantor's power to shift the enjoyment of the property among others, which power is terminated by death.

Section 302 (d) of the Revenue Act of 1926, *supra*, was designed to reach what Congress deemed a substitute for testamentary dispositions. The facts of the instant case justify the assumption that the disposition here was, in fact, a substitute for a testamentary disposition and, hence, the statute is valid, even though literally construed.

ARGUMENT

I

THE PROVISIONS OF SECTION 302 (D) OF THE REVENUE ACT OF 1926 REQUIRE THE INCLUSION OF THE VALUE OF THE CORPUS OF THE TRUST IN THE DECEDENT'S GROSS ESTATE

Section 302 (d) of the Revenue Act of 1926, *supra*, provides that there shall be included in the decedent's gross estate the value of any property—

> of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *.

In this case, the decedent in conjunction with the trustee and decedent's husband had the power to revoke or amend the trust. Therefore, the trust comes within the precise language of the statute which requires merely that the power of revocation or amendment be in the decedent alone or "in conjunction with any person."

The statute is broad and clear. It is not limited to cases where the decedent has power to revest title in himself. *Porter* v. *Commissioner*, 288 U. S. 436; *White* v. *Poor*, 75 F. (2d) 35 (C. C. A. 1st). Nor does it require that the grantor alone must be able to exercise the power of revocation or amendment, or even that he with one having no adverse interest must be able to exercise the power. The statute requires merely that the grantor in conjunction with *any person* retain the power to alter, amend or revoke. There is no qualification contained in the statute, and its application should not be restricted, by construction, to cases where the person with whom the decedent shares the power is someone other than a beneficiary. It is well settled that when the language of a statute is clear and unambiguous, there is no room for interpretation. *Cherokee Tobacco* v. *United States*, 11 Wall. 616; *Yerke* v. *United States*, 173 U. S. 439; *Ruggles* v. *Illinois*, 108 U. S. 526, 534; *Hamilton* v. *Rathbone*, 175 U. S. 414; *Thompson* v. *United States*, 246 U. S. 547, 551; *Reinecke* v. *Smith*, 289 U. S. 172, 174.

The court below construed the statute as if it read "in conjunction with any person *not a beneficiary of the trust.*" This construction was also given to the statute by the courts in *White* v. *Poor*, *supra;* and *Helvering* v. *Helmholz;* 75 F. (2d) 245 (App. D. C.), both of which cases are now before this Court on writs of certiorari. We submit that such a construction superimposes on the language

of the statute a qualification not therein contained, and, in effect, amends the statute under the pretense of construing it. *Heiner* v. *Donnan*, 285 U. S. 312, 331. This Court, in *United States* v. *Goldenberg*, 168 U. S. 95, said (p. 102):

> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

Cf. *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327.

The respondent may cite the case of *Burnet* v. *Guggenheim*, 288 U. S. 280, as an instance where a court read into a statute words not therein contained. However, the statute in question in that case was not clear and required construction, and the Court adopted what it conceived to be a reason-

able construction of a doubtful statute. *Burnet* v. *Guggenheim, supra,* involved the construction of provisions of the Revenue Act of 1924, imposing a gift tax upon the "transfer * * * by gift during such calendar year of any property wherever situated, whether made directly or indirectly." The words "transfer by gift" were subject to interpretation to ascertain when the transfer by gift should be deemed to have been made in the case of a revocable trust. The Treasury Department construed the statute to mean that where the creator of a trust retained the power to revest title to the corpus of the trust in himself, a taxable transfer by gift should be treated as taking place in the calendar year in which the power was terminated, rather than in the calendar year in which the trust was created. The Court sustained the regulation.

The words "any person" in the statute here involved require no interpretation, and *Burnet* v. *Guggenheim, supra,* is not authority for restricting the plain language of the statute.

In *Commissioner* v. *Strauss,* 77 F. (2d) 401, the Circuit Court of Appeals for the Seventh Circuit, finding no obscurity of language, no uncertainty of meaning, and no inconsistent provisions in the Revenue Act, gave to Section 302 (d), *supra,* a literal construction, and refused to construe it as it was construed by the court below in the instant case and by *White* v. *Poor, supra,* and *Helvering* v. *Helmholz, supra.*

The legislative history of Section 302 (d) supports our contentions herein. The Report of the Ways and Means Committee contains the following (H. Rep. No. 179, 68th Cong., 1st Sess., p. 28):

> By this subdivision if the decedent had the power at the time of his death to change the enjoyment of a property interest, which he had transferred, or with respect to which he had created a trust, such interest is to be included for estate-tax purposes in his gross estate. Likewise, if the decedent had relinquished such a power in contemplation of death, except by a sale for a fair consideration, the property interest over which he had such a power is to be included in his gross estate.
>
> Even though the decedent has made the transfers specified in this subdivision, he has retained substantial control over the disposition of the property, through the power to change the enjoyment thereof. Such property interests should therefore fairly be taxed as part of the decedent's estate, particularly since, by virtue of his death, the substantial interest which he had has been wiped out, and to the same extent the property interest of the legal title holder, his transferee, has been increased. This provision is in accord with the principle of section 219 (g) of the bill which taxes to the grantor the income of a revocable trust.[1]

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[1] Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 219 (g): "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction

There was, as Congress recognized, a somewhat similar purpose reflected in Section 219 (g), relating to income tax, and Section 302 (d), relating to estate tax. But the two provisions are not identical; they differ in two respects. Section 219 (g) of the Revenue Acts of 1924 and 1926 [2] requires that, in order to tax the income of a trust to the grantor, he must exercise whatever power he has in conjunction with any person *not a beneficiary;* they also require that his power must consist of the *right to revest title in himself.* These differences the dissenting opinion in this case pointed to as an indication that Congress meant in each section exactly what it said. (R. 27.) If, in enacting Section 302 (d), Congress did not mean to require that the grantor should have the power to revest title in himself (*Porter* v. *Commissioner, supra*) and had a contrary intention in Section 219 (g), it is reasonable to conclude that Congress did not mean to restrict the application of Section 302 (d) to cases where the power to revoke or amend must be exercised in conjunction with someone not a beneficiary

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with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." (U. S. C., Title 26, Section 960.) This section is identical with Section 219 (g) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Section 960).

[2] Identical with the same section of the 1924 Act—See footnote [1].

of the trust, although Section 219 (g) was so restricted.

There is justification for this distinction. The theory of the imposition of the income tax in such cases is that the grantor must have the power to enjoy the income, so there is a reason for providing that the power shall be exercised by him and someone not a beneficiary. See *Reinecke* v. *Smith*, 289 U. S. 172. The same reason does not exist as to the estate tax. It is not like the income tax dependent upon present ownership or something "fairly to be dealt with as equivalent to ownership" (*Burnet* v. *Wells*, 289 U. S. 670, 679; *Poe* v. *Seaborn*, 282 U. S. 101, 116), but is imposed upon gifts in contemplation of death and other dispositions which may reasonably be classified as testamentary in character or as substitutes for testamentary dispositions.

Congress, after the original enactment of Section 219 (g) of the Revenue Act of 1924, which taxes the income of a revocable trust, has subsequently placed restrictions in that section upon the power reserved (Section 166, 1932 Act; Section 166, 1934 Act), but, on the other hand, has maintained Section 302 (d) substantially as originally enacted in 1924.

In the case of *Witherbee* v. *Commissioner*, 70 F. (2d) 696 (C. C. A. 2d), certiorari denied, 293 U. S. 582, it was argued that Section 302 (d) did not require the inclusion of the value of certain trusts in the gross estate of a decedent, where he could only exercise the power of amendment or revocation in conjunction with a *trustee*, for the reason that the

trustee's interest was adverse to that of the grantor. The Court rejected the argument, holding that the statute clearly applied and that the only question was its validity which it sustained as applied to the facts in that case. Hence the necessity for the trustee's consent is immaterial here.

The court below, in deciding the instant case, as also the Court in *White* v. *Poor, supra,* and *Helvering* v. *Helmholz, supra,* regarded the decision of this Court in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, as controlling here. That case arose under the Revenue Act of 1921, which did not contain the provision, or any provision similar to, 302 (d) of the 1924 and 1926 Acts; and the Court passed only upon the applicability of a provision relating to transfers intended to take effect in possession or enjoyment at or after death, similar to Section 302 (c) of the Revenue Act of 1926.[3] As pointed out in *Milliken* v. *United States,* 283 U. S. 15, the only relevant question in the *Northern Trust Co.* case was, as to the transfers there involved (p. 20):

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[3] Revenue Act of 1926, c. 27, 44 Stat. 9:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

> * * * whether some of them were of the class intended by Congress to be taxable under § 402 (c) as transfers "intended to take effect in possession or enjoyment at or after death." * * *

Clearly the decision of this Court in *Reinecke* v. *Northern Trust Co., supra,* is not controlling here. The Court was not there construing any provision analogous to Section 302 (d), and did not pass on the question here presented. In *Porter* v. *Commissioner, supra,* this Court, in construing and applying Section 302 (d), *supra,* for the first time, distinguished the *Northern Trust Co.* case and held it "not in point."

In *Dort* v. *Helvering,* 69 F. (2d) 836, certiorari denied, 293 U. S. 569, the trust instrument reserved to the settlor a power to make any change in the beneficial interests with the consent of the trustee, and, in view of this reserved power, the court held the corpus to be part of the decedent's gross estate, pursuant to Section 302 (d) of the Act of 1924, which is identical with Section 302 (d) of the Revenue Act of 1926. Referring to *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, the court stated as follows:

> * * * we do not think the holding in the *Reinecke* Case in point in this, for there, first of all, the Supreme Court was dealing with another and wholly different section of the Revenue Statute (Revenue Act of 1921, § 402 (c), 42 Stat. 278), and, secondly, be-

cause the language of the trusts there and here is not the same. Subdivision (d), with which we are here concerned, is more far-reaching than the provisions of the 1921 act, and there is a marked distinction between the property to be included for death tax under its provisions and under the provisions of the former act. * * *

II

THE PROVISIONS OF SECTION 302 (D) OF THE REVENUE ACT OF 1926 WHEN SO CONSTRUED AS TO REQUIRE THE INCLUSION OF THE VALUE OF THE CORPUS OF THE TRUST IN THE DECEDENT'S GROSS ESTATE ARE NOT UNCONSTITUTIONAL

Section 302 (d) was designed to prevent estate tax evasion and was intended to reach what Congress deemed a substitute for testamentary dispositions. House Report No. 179, 68th Congress, 1st Session, p. 28, *supra,* shows that it was the aim and intent of Congress to place a tax on property over which the decedent, even though he had made a transfer prior to death, "retained substantial control over the disposition of the property."

It is true that here the decedent's power to revoke or amend the trust was restricted, since it had to be exercised in conjunction with the trustee and her husband, who had an interest in the income contingent upon his surviving the decedent, and an interest in the corpus contingent upon his being alive at the termination of the trust. However, it is not to be assumed that the husband would oppose

every change that the decedent might desire to make, simply because of his contingent interest in the trust. The fact that the decedent chose her husband as a person to share with her the power suggests that she was of no such belief. In trusts where the grantor makes provision for members of his family and places the power of revocation or amendment in himself and one or more members of the family who are beneficiaries, it is obvious that this power is not created with the thought that it will not be exercised. In the instant case, the relationship between the decedent and her husband would warrant her belief that by sharing the power with him she was not relinquishing her control over the trust estate. The solidarity of the family is a circumstance of considerable importance, and cannot be ignored in a case of this type, since the taxing statutes look through the form to the substance of a transaction. *Weiss* v. *Stearn,* 265 U. S. 242; *Eisner* v. *Macomber,* 252 U. S. 189, 211.

Certainly, it cannot be assumed that the husband would oppose any alteration or amendment which would inure to his benefit, and, to that extent at least, his beneficial interest was not adverse. That, alone, should justify inclusion of the trust property in the decedent's estate, for thereby she maintained a substantial control over the trust estate.

We submit that Congress may not be said to have acted arbitrarily or capriciously in assuming that such a grantor has really retained the substantial control over the trust estate, which justifies the tax.

The purpose behind the creation of such a trust as is here involved clearly warrants the assumption. Were it not for the statute, the grantor in such case, while retaining control over the trust estate until death, could prevent the assessment of estate taxes on trust estate by the simple expedient of giving to a member of his family a small interest in the trust and sharing with him the power to revoke or amend the trust.

In *Porter* v. *Commissioner, supra,* the Supreme Court held that the corpus of a trust should be included in the gross estate under Section 302 (d) when the grantor had the power to revoke the trust but could make no change for his own benefit. See also *Cook* v. *Commissioner,* 66 F. (2d) 995, certiorari denied, 291 U. S. 660, and *Dort* v. *Helvering, supra.* If the corpus of a trust may be reached where the grantor has no power to recapture it for his own use, it seems that the justification of the tax lies in his power to shift the enjoyment of the property among others, which power is terminated at his death. Even in the case where he has the power in conjunction with one *not* having an adverse interest, it cannot be said, as a matter of law, that the person exercising the power with him will necessarily agree to any changes that he will desire to make. (See *Witherbee* v. *Commissioner, supra.*) Hence, it is the possibility of a change, rather than the certainty of a change, that must form the basis of the application of the tax. If that is true, there seems to be no reason for holding that the tax can-

not be imposed where the power of revocation must be exercised in conjunction with one having an adverse interest. It cannot be said that such a person will oppose any change made by the grantor, so that the possibility of change, while remote, is not lacking.

There was a possibility of a change of beneficiary in the instant case, just as there was in *Porter* v. *Commissioner, supra,* and the ceasing of this possibility upon the decedent's death might reasonably be deemed a substitute for a testamentary disposition. We submit that since the transfer here was subject to change until the decedent's death and was not complete until death had occurred, the transfer was a substitute for a testamentary disposition which Congress had power to tax in order to make the taxation of estates complete and consistent and in order to prevent the easy evasion of taxes.

In *Porter* v. *Commissioner, supra,* it was argued that the provision violated the due-process clause of the Fifth Amendment, in that it taxed gifts *inter vivos* that were fully consummated prior to the enactment of the provision and would be confiscatory under *Nichols* v. *Coolidge,* 274 U. S. 531, and *Heiner* v. *Donnan, supra.* The Court said (pp. 444–445):

> But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of

> other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in Sec. 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition. *United States* v. *Wells,* 283 U. S. 102, 116. There is no doubt as to the power of Congress so to do. *Reinecke* v. *Northern Trust Co., supra. Chase National Bank* v. *United States, supra. Tyler* v. *United States, supra,* 502. *Klein* v. *United States,* 283 U. S. 231. *Gwinn* v. *Commissioner,* 287 U. S. 224.

Cf. *Witherbee* v. *Commissioner, supra.*

This Court, in *Burnet* v. *Wells,* 289 U. S. 670, upheld the validity of a tax imposed upon the grantor of a trust, with respect to income from the trust used to pay premiums on insurance on the grantor's life, though he had no power to revoke the trust or demand that the income be devoted to any other purpose. This Court said (pp. 677–679):

> The controversy is one as to the boundaries of legislative power. It must be dealt with in a large way, as questions of due process

always are, not narrowly or pedantically, in slavery to forms or phrases. "Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid." *Corliss* v. *Bowers*, *supra*, p. 378. Cf. *Burnet* v. *Guggenheim*, *supra*, p. 283. Refinements of title have at times supplied the rule when the question has been one of construction and nothing more, a question as to the meaning of a taxing act to be read in favor of the taxpayer. Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common-law traditions. The question is whether it is one that an enlightened legislator might act upon without affront to justice. Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits. *Milliken* v. *United States*, 283 U. S. 15, 24, 25; *Reinecke* v. *Smith*, *supra*. Liability does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits enjoyed by the most favored owner at a given time or place. *Corliss* v. *Bowers*, *supra*; *Reinecke* v. *Smith*, *supra*. Government in

> casting about for proper subjects of taxation is not confined by the traditional classification of interests or estates. It may tax not only ownership, but any right or privilege that is a constituent of ownership. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 268; *Bromley* v. *McCaughn,* 280 U. S. 124, 136. Liability may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis. A margin must be allowed for the play of legislative judgment. To overcome this statute the taxpayer must show that in attributing to him the ownership of the income of the trusts, or something fairly to be dealt with as equivalent to ownership, the lawmakers have done a wholly arbitrary thing, have found equivalence where there was none nor anything approaching it, and laid a burden unrelated to privilege or benefit. *Purity Extract & Tonic Co.* v. *Lynch,* 226 U. S. 192, 204; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303; *Milliken* v. *United States, supra.* The statute, as we view it, is not subject to that reproach.

The Court in *Burnet* v. *Wells, supra,* was speaking of an income tax, in which form of taxation greater emphasis is given to "refinements of title" than in the field of estate taxes. Yet in that case the Court recognized that the possibility of evasion of taxes through the creation of inheritance trusts

in which the "solidarity of the family" was a factor, justified allowing a margin for the play of legislative judgment.

The principles which were applied by the Court in *Burnet* v. *Wells, supra,* justify the tax here. As the Court has pointed out in *Burnet* v. *Guggenheim, supra,* there has been a constant broadening of the concept of what constitutes a substitute for a testamentary disposition of property in deciding what are the limits of Congressional power in imposing an estate tax. See *Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Tyler* v. *United States,* 281 U. S. 497; *Gwinn* v. *Commissioner,* 287 U. S. 224; *Third Nat. Bank & Trust Co.* v. *White,* 287 U. S. 577; *Milliken* v. *United States,* 283 U. S. 15; *United States* v. *Wells,* 283 U. S. 102.

It is well settled that except in rare instances the Fifth Amendment is not a limitation upon the taxing power of Congress. *Brushaber* v. *Union Pac. R. Co.,* 240 U. S. 1, 24; *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Heiner* v. *Donnan,* 285 U. S. 312, 325. We think it is also settled that an exercise of the taxing power by Congress would be sustained by the courts unless it clearly appears that the method devised by Congress is arbitrary and capricious. In *Magnano Co.* v. *Hamilton,* 292 U. S. 40, where the taxpayer sought to invoke the due proc-

ess clause of the Fourteenth Amendment to bar the collection of a state tax levied on oleomargarine, the Court said (p. 44):

> That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.

The sole question in deciding the validity of each new provision is whether Congress has acted arbitrarily or capriciously.

We submit that to characterize the creation of such a trust as is involved here as a substitute for a testamentary disposition, is not capricious or arbitrary, but reasonable. Nor can it be said that Congress has done a wholly arbitrary thing in requiring the inclusion in a decedent's gross estate of the full value of the corpus of a trust, even when the power of revocation or amendment of the trust is to be exercised by the grantor in conjunction with one having a beneficial interest. The question of due process must be viewed broadly (*Burnet* v. *Wells, supra*), and we think that the line has not been crossed in this case.

III

THE COURT BELOW SHOULD HAVE INCLUDED IN THE DECEDENT'S GROSS ESTATE THE VALUE OF THE REMAINDER INTERESTS OF THE DECEDENT'S CHILDREN IN THE TRUST ESTATE

The majority of the court below held that the value of the entire trust was to be excluded from the gross estate of the decedent. In *Lit* v. *Commissioner*, 72 F. (2d) 551, the Circuit Court of Appeals for the Third Circuit held that the wife's life estate could not be taxed, since she had to consent to revocation and her interest was adverse, but held the son's remainder interest to be taxable. The dissenting opinion in this case is in accord with the *Lit* decision, in holding that the corpus of the trust, less the value of the husband's interest, should be included in the decedent's gross estate.

We submit that even if the value, whatever it may be, of the husband's interest could not be constitutionally included in the decedent's gross estate, no such objection applies to the remainder interests, i. e., the value of the decedent's children's interests. As to these interests, the doctrine of *Reinecke* v. *Northern Trust Co., supra,* clearly would not apply, since the consent of none of the children was necessary to an amendment or revocation of the trust, and as to their interests the life estate of the husband was not an adverse interest. Accordingly, even if this Court should be of the opinion that the

adverse interests of the husband precludes the inclusion of his life estate in the decedent's gross estate, the decision below should be reversed and the case remanded to determine from the record, if possible, the value of the remainder interests of decedent's children and to require the inclusion of the value of such interests in the decedent's gross estate.

The lower court, however, held that the remainder interests of decedent's children were not taxable, stating that—

> * * * in view of the permissible use of the entire corpus for the "care, comfort, support or advancement in life" of her [settlor's] husband and the right to use any or all of it at any time during his lifetime, it may well be that the daughters would never become entitled to any of the corpus of the trust.

The effect given by the lower court to this provision is erroneous. The provision does not preclude the applicability of the *Lit* decision, stated hereinabove. Such part, if any, of the corpus which, at the settlor's death, would be found necessary for the support of the husband, would be definitely ascertainable (*Ithaca Trust Co.* v. *United States*, 279 U. S. 151), and would merely be one further item in connection with valuing the husband's interest. But so much of the corpus in excess thereof remains taxable.

CONCLUSION

We submit that the decision of the court below is erroneous and should be reversed. In any event, as to the remainder interests of the decedent's children, the interests of the decedent's husband was not adverse, and such remainder interests should have been included in the decedent's gross estate; hence, the decision below should be reversed and remanded for such inclusion.

Respectfully submitted.

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